IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 229 of 2001

in

COMPANY PETITIONNo 51 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VIRAT ENGINEERING PRIVATE LTD.

Versus

HARLEYSTREET PHARMACEUTICALS LTD.

Appearance:

1. COMPANY APPLICATION No. 229 of 2001

MRS SWATI SOPARKAR for Petitioner No. 1

MR VC DESAI for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 22/03/2002

CAV JUDGEMENT

1. The Original petitioner-Virat Engineering Private Ltd. has taken out this Judges Summons with a prayer that the order dated 31.1.1995 passed by this Court in Company Petition No. 51 of 1990 dismissing the petition under Rule 31 of Company Court Rules be reviewed and the company petition be refixed for hearing on merits. It is also simultaneously prayed that any other and further relief as this Court deems fit, just and proper also may be granted.

2. This judges summons is taken by Mrs. Soparkar learned counsel for the applicant and supported by the affidavit of her clerk Mr. Yogesh R. Patel. The copy of the judges summons was served to Mr. A.C. Gandhi learned counsel for the opponent company. For the sake of convenience and to appreciate the rival contentions raised before this Court, the order sought to be reviewed by the applicant (ori. petitioner) is reproduced as under:

> "On 10.1.1995 by a common order along with other matters, this matter was also notified on a special Board. Occasion arose for this court to pass the common order because, in many matters listed for final hearing, the petitioners had not taken trouble to get the matter advertised or to file affidavit as to the advertisement. Under Company Court Rules 31, this would amount to a default in! carrying out the direction. With a view to give one chance time was fixed upto 23rd of January, 1995 to submit to the Court that there is no breach of the said Rule and the directions as to advertisement have been carried out.
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> The Department was instructed not only to affix the Board prominently at all the places where boards are published and affixed, but as far as possible to inform the concerned Advocates individually also. On account of personal reasons, the matter could not be taken up on 23.1.1995 and therefore, the entire Board of that date was adjourned to 30.1.1995. This happens to be one of the matters, where inspite of granting of this much time and bringing to the notice of the concerned learned Advocate, there is no compliance of the directions as to publication of notice and filing of affidavit. This matter is therefore, liable to be dismissed under R. 31 of the Company Court Rules. Accordingly, the matter

is dismissed for want of prosecution."

3. The applicant had filed Company Petition No. 51 of 1999 seeking winding up of the opponent company and the same was admitted by this Court vide order dated 15.2.1993. Undisputedly, the opponent company was desirous to prefer an appeal against the order of admission, the publication of advertisement was deferred for four weeks. The appeal preferred by the opponent company against the order of admission was dismissed by the Division Bench dealing with the OJ appeals vide order dated 15.3.1993 and the date of the hearing of the winding up petition was fixed on 12.7.1993. As per applicant it got petition advertised in "Times of India" and "Sandesh" to the effect that the petition is ordered to be heard on 12.7.1993 in compliance of the order passed on the day of admission. It is not a matter of dispute that the affidavit of publication of advertisement was not filed in this Court as provided under the Rules (Rule 31). The affidavit filed in support of the application says that "it is not possible at this stage to state the exact reason for delay, however, the reason appears to be that by that time, the applicant had shifted his office at Bombay inasmuch as the premises at which the applicant was situated namely Natraj Hotel was sold away to third party." The Company Petition No. 51 of 1990 was listed on the separate Board by the Registry along with other large number of matters on the ground that affidavit of publication was not filed with the Registry. The first part of the above referred order dated 31.1.1995 indicates that the Registry was directed by common order to notify on separate Board all the matters listed for final hearing where the petitioner had not taken trouble to get the matter advertised or to file affidavit as to the advertisement. It appears that this Court had offered a chance to comply with the direction as to the advertisement of the matter. There was no compliance of the direction as to the publication of notice and filing of the affidavit, the Court was inclined to dismiss the matter for want of prosecution in reference to Rule-31 of the Company Court Rules.

4. The plain reading of the order passed on 31.1.1995 in Company Petition No. 51 of 1990 clearly indicates that on 10.1.1995 a common order along with other matters was passed and the matter was also notified on a special Board. Occasion arose for passing the common order is also reflected in the order. Company Petition was ordered to be dismissed for default as the Court had found that :

"there is no compliance of the directions as to publication of notice and filing of affidavit. This matter is therefore, liable to be dismissed under Rule 31 of the Company Court Rules."

5. Undisputedly, the Court had felt that inspite of granting of this much time and bringing to the notice of the concerned learned advocate that there was no compliance of the directions, the petition must be dismissed.

6. The resistance in the reply affidavit, if perused and appreciated with all other aspects it can be said that this is an affidavit of denial. It further contends that this is a case of absence of due care and diligence on the part of (i) Advocate's Clerk, (ii) Counsel appearing for the petitioner and (iii) petitioner-company itself. It is averred that there is no satisfactory explanation. The facts contrary to the record stated on oath, the vague and baseless reasons are pressed into service and on such a case delay caused in filing Review Petition beyond 30 days cannot be condoned.

7. Placing reliance on the settled legal proposition Mr. VC Desai has submitted that when this Court while dismissing the company petition for default has positively mentioned in the order that the concerned learned advocate was informed, than it should be accepted as true recording of the proceedings which must have taken place in the court and the oral say of the learned counsel which is before this Court today by way of affidavit cannot be accepted. Such version should be rejected as unsustainable. This Court should not be too liberal in such a case. Learned counsel could have verified the relevant register maintained by the Registry because the department was instructed not only to affix the Board prominently at all the places where bards are published and affixed, but as far as possible to inform the concerned Advocates individually also. On account of personal reasons, the matter could not be taken up on 23.1.1995, the notified day. According to Mr. Desai such application should not be granted only on the ground that otherwise the applicant would suffer grave and irreparable injury or lose. According to the respondent, the statement made by the petitioner is not only vague but is also false. In spite of having been informed by the department, since concerned advocate has not taken any steps to comply with the directions and has not cared to restoration of the company petition in couple of days itself is an indicative of the fact that the applicant

has given up the Lis. The period of lapse of six years and five months around is also relevant and such a period cannot be condoned on a concocted or a false story. The application of the applicant lacks of bonafide and the same should be rejected on all these grounds. The apprehension expressed by Mr. Desai is that if this application is restored to file than the same would relate back to the date of commencement of the winding up proceedings. This would seriously prejudice to all subsequent transactions of the respondent-company since the date of dismissal of the company petition. The parties who are not before the court may adversely affects in case the respondent-company is ordered to be wound up after restoration. So, this Court should not exercise its powers under sec. 5 of Limitation Act.

8. On perusal of the proceedings and the entire record of Company Petition No. 51 of 1990 and after careful consideration of the contentions raised by the parties in their more than one affidavits, following facts which are very relevant for the purpose of deciding this application, emerges:

1) The applicant-Virat Engineering Pvt. Ltd. had a claim against respondent-company with interest at the rate of 20% per annum against advance of sum of Rs. 8,37,304/ as and by way of call money deposit to the respondent-company.

2) On account of terms of repayment of the said deposit, a dispute had crabbed and the said dispute had been referred to the Sole Arbitrator by way of an agreement dated 5.11.1988.

3) (i) Arbitrator gave an interim award on 26.2.1988 and 10.2.1989 and the respondent-company was directed to repay to the petitioner-company a sum of Rs. 3,97,298/ together with interest at the rate of 20% per annum to be compounded at quarterly rates from 1.4.1989. Because of the non-payment of the first instalment on 1.1.1990, after serving notice to the respondent-company a winding up proceedings were instituted by filing petition (i.e. Company Petition No. 51/1990).

(ii) Company Petition was admitted and the order of admission has been confirmed by Appellate Bench.

(iii) After decision of the Appellate Bench,

notice of admission was to be advertised.

4) This is not a case where there was no compliance of the directions as to the publication of notice and filing of the affidavit both. This is a case of failure of filing of affidavit as to the publication of advertisement ordered by the Company Court, as provided by Rule only.

5) Undisputedly, the order as to publication of advertisement was complied in the present case, but the same was not pointed out to the Court even by Ld. counsel for the respondent-company.

6) Non-filing of the affidavit as to the publication of advertisement cannot be said to be a default or negligence on the part of the petitioner-company itself, because such work normally has to be undertaken by the learned counsel appearing for the petitioner-company, unless it is otherwise proved or established.

7) It is not the say of the respondent-company even today that some amount, after institution of the petition was paid and, therefore, it is difficult for this court to accept the plea of the respondent-company that this is a case of "given up the Lis." A company who has spent substantial amount for publication of advertisement normally would not give up the Lis when there were interim awards in favour of the petitioner-company by the Arbitrator appointed under a lawful agreement and after success in O.J. Appeal.

8) On the strength of the oral order passed by the company Judge, number of matters were listed on the ground that the affidavit of publication was not filed in the Registry, but the Advocate's Clerk Mr. Yogesh R Patel had not noticed the separated Board and, therefore, he had not informed the advocate or the applicant about this fact. In supporting affidavit Mrs. Swati Soparkar also says the same thing and she has accepted that had she been informed of such thing, she would have immediately taken necessary action to satisfy the technical defect of non-filing of the affidavit of publication and avoided the matter from being dismissed from want of prosecution. So, this is a case of explained inaction and not of willful omission.

9) This is also a case where the applicant company had shifted its office at Bombay and, therefore, there was communication gap. The respondent though have not admitted this aspect in affidavit in reply but it is on record that the office of the applicant-company was shifted and as the Gujarat High Court also has been shifted in the year 1998-99, as submitted, the record of disposed of matters in the new premises either were not available or the same were not easily traceable.

9. There is no reference as to the presence of the advocate of respondent-company on the day on which company petition was dismissed for want of presence of the advocates.

10. During the course of hearing of the present application, learned counsel for the respondent-company Mr. Desai when asked to verify as to whether learned counsel for the respondent was present on the date of dismissal of the petition for non-prosecution, but the learned counsel for the respondent-company was not in a position to make any positive statement in this regard. If the counsel for the respondent-company would have been there, than it was obligatory on his part to inform about the publication of advertisement. In the concerned company petition, the advertisement in both the newspapers have been published and this is not a case of non-publication of notice. This contingency has played a vital role, otherwise this court would not have held the petitioner-company, a defaulter and responsible for non-compliance of both the conditions; i.e. (i) non-compliance of the directions as to the publication of the notice; and (ii) filing of affidavit.

11. Filing of affidavit as to publication of advertisement is a statutory notice. Undisputedly, it is basically important and, therefore, scope for the company Judge to offer opportunity to file affidavit in this regard. Disappearance of a matter or not listing of a particular petition or matter on the Board is not unusual.

12. Learned counsel Mrs. Soparkar and the clerk attached to her have accepted certain factual position and it is clear that this is a case of dereliction of the duty on the part of the advocate's clerk.

13. There is nothing in affidavit in reply under which the version of Mrs. Soparkar should be turned down

or should be treated as objection or untrue. The period of delay for which the contention has been raised is very relevant but it is not always relevant when sufficient cause is made out for condonation of delay.

14. Absence of bonafide when pleaded by the respondent-company should be appreciated in the light of the totality of facts and circumstances of the case including the unhealthy or dishonest stand, if any, is taken by otherside.

15. After having given anxious consideration to the above points and the oral arguments advanced before this Court, the Court feels that the grounds put forward by the petitioner-company is accepted and the delay is condoned than it is likely to prejudice the third party and may create unreasonable burden on the respondent-company, but as per the settled legal proposition of law while dealing with the request to condone the delay caused in instituting of legal proceedings, this Court has remained consistent and has held that normally the policy must be to condone the delay and see that substantial justice is administered. Ultimately, it is a discretionary order. The Court in such a case should be liberal and should not take highly technical view in the matter where there is no case of negligence or inaction to take steps for filing appeal or restoration proceedings and the court if is satisfied that the applicant was not sleeping over the matter than the endeavor by the court should be to do substantive justice and not of throwing away the case on technicality of limitation. While interpreting the word 'sufficient cause' occurring in sec. 5 of the Limitation Act and other similar statute, the applicant is supposed to explain the delay. If such explanation is rendered than the same should be honestly in rational, common sense and pragmatic manner and should not be understood in pedantic and impractical way. Ordinarily, the litigant does not stand to benefit by instituting the proceedings at belated stage. However, if it is established that belated institution of the proceeding is likely to put such petitioner or applicant to sum benefit of advantage or it is likely that the same may adversely affects the third party or prejudice to the otherside than in that case, the court should think on number of aspects. Following aspects can be taken as guidelines, of course, these are illustrative and not exhaustive:

i) refusal to condone the delay whether is likely to defeat the meritorious matter and the cause of

justice;

ii) Whether the approach of the court would be considered as highly technical view in the matter under consideration;

iii) when a substantial justice versus other technical consideration are pitted against each other, the cause for substantial justice deserves to be preferred;

iv) non-deliberate delay element or explained inaction on the part of a lawyer or advocate's clerk whether emerges on record;

v) attitude of resisting party when restoration is prayed or delayed proceedings has been instituted including bonafide;

vi) whether it is easy and/or practicable for the court to condone the delay by awarding reasonable amount of costs or by adopting other legal device or methods or imposing certain conditions;

vii) if the condonation of delay prayed is not accepted whether it is likely to to put the resisting party to a great advantages which may damage the basic need and trend to do substantive justice. A good cause whether should be permitted to turn into a bad cause;

16. In case on hand, the reasons for delay caused are satisfactorily brought on record. Sufficient cause is a question of facts in each case and not a pure question of law. The delay is satisfactorily explained and established by the applicant and the principle of law only is that the courts are required to take a liberal view while considering the fact constituting the sufficient say of the cause on the basis of which condonation of delay is sought. I agree that this does not necessarily mean that all applications for condonation of delay must be allowed. Ultimately, it is necessarily within the discretionary jurisdiction of the court. Absence of malafide and dishonest intention does not emerges in this case. Idea must be to have substantive justice. Each day delay is not required to be explained sufficient cause if established and is acceptable to the court than the period of delay would not remain very relevant at that point of time the substantive justice and the merits of the matter should be zealously favoured. In more than one decisions, this

court and the Apex Court and number of other High Courts have condoned the delay where the courts were satisfied that the same is caused because of some negligence on the part of the advocate's clerk or counsel himself. Here the roll of counsel appearing for the respondent -company is also found relevant. The applicant who is awarded with interim award with 20% interest which is to be compounded quarterly rates as per the interim awards passed by the Arbitrator can be compensated or can be saved from the disadvantageous position. By developing some device at the time of granting the application for condonation of delay, such apprehended prejudice can be prevented. Mrs. Soparkar has rightly submitted that the scheme of sub-section 2 of section 536 of Companies Act give wide powers to this Court. It would be proper to quote the relevant sub section-2 of section 536 of the Companies Act, which reads as under:

Avoidance of transfers, etc., after commencement of winding up.

536. (1) xxx xxx xxx

(2) In the case of a winding up by or subject to the supervision of the Court, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Court otherwise orders, be void."

17. On restoration of the winding up petition would relate back to the date of commencement of winding up proceedings but the words "unless the Court otherwise orders be void" are important for the purpose of this application.This Court legally protect all transactions which might have taken place from the date of dismissal of petition for want of prosecution and the date of institution of present proceedings i.e. 17.8.2001, so that the hardship to the third party in whose favour the transactions are made during this period and such transactions themselves can be saved from their voidability. It is not correct, as submitted by Mr. Desai that this can be done only by the Company Court and at the time of passing of winding up order otherwise it would be very difficult for the Company Court to restore each such winding up petitions after good reasonable period. Under the guise of likelihood of hardship and

prejudice to the third party, the respondent-company cannot escape from its obligation if the delay is found condonable. Safety bunker can be created by this Court while condoning delay as provided under sec. 536 (2) of the Companies Act.

18 The case of Navjivan Mills Ltd., reported in 59 Company Cases, (1986) p. 201, this Court has held that the Court can exercise the jurisdiction under sec. 536(2) of the Companies Act of giving directions relating to validity or validating proposed transactions pending a petition of winding up and before the winding up order is made, on account of good reasons. This ratio can help this Court while evolving some device with a view to do substantive justice. Similar view has been expressed by this Court in the case of Commercial Ahmedabad Mills Co. Ltd., reported in 60 Company Cases, (1986) p. 717 and it is observed that in the suitable cases, the Court has jurisdiction to pass an order for validating proposed transfer pending winding up petition. The transfer which are proposed transfer or the transfers which have already taken place can be validated by the Court and it is not necessary that such order can be passed only at the time of passing winding up order.

19. It is axiomatic that condonation of delay is a matter of discretion of the Court. section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory.

20. In the case of N. Balakrishnan vs. M. Krishnamurthy, reported in AIR 1998 SC p. 3222 where delay of 883 days have been ordered to be condoned. The Apex Court has said that:-

> "Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time

would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain vs. Kuntal Kumari, AIR 1969 SC 575 and State of West Bengal v. The Administrator, Howrah Municipality, AIR 1972 SC 749.

It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not struck of malafides or it is not put-forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and be too would have incurred quite a large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant the Court shall compensate the opposite party for his loss."

21. The ratio of the decision in the case of Shyamal Kanti Danda vs. Chunilal Choudhary, reported in AIR 1984 SC p. 1732 also shall have to be considered. Percolation of the verdict of Apex Court in such cases must be in correct perspective and with all spirit.

22. In view of the above facts and circumstances of the case, the Court feels, that (i) with a view to do substantive justice and, (ii) that the petitioner company by itself is not found negligent, and that its case need not be thrown out of the court on technicality when otherwise the claim is meritorious. The order of dismissal of petition after publication of advertisement for want of prosecution for non-compliance of some procedural rules is likely to take the petitioner company to serious prejudice and it would be miscarriage of justice. The petitioner had approached the court with winding up petition as the interim award passed by the Arbitrator appointed by the parties were not complied with. The petition, therefore, was not in the style of recovery of money proceeding. Negligence on the part of the clerk of counsel or some loose on the part of the counsel appearing for the petitioner-company is only found and, therefore ignoring period of delay caused, the Company Petition No. 51 of 1990 is requires to be restored on file. So, in case of N. Balakrishnan (supra) the Apex Court with a view to struck the balance has ordered that:

> "In this case explanation for the delay set up by the appellant was found satisfactory to the trial Court in the exercise of its discretion and the High Court went wrong in upsetting the finding, more so when the High Court was exercising revisional jurisdiction. Nonetheless, the respondent must be compensated particularly because the appellant has secured a sum of Rs. Fifty thousand from the delinquent advocate through the Consumer Disputes Redressal Forum. We, therefore, allow these appeals and set aside the impugned order by restoring the order passed by the trial Court but on a condition that appellant shall pay a sum of Rupees Ten thousand to the respondent (or deposit it in this Court) within one month from this date."

23. Of course, the order of granting condonation of delay and accepting review application shall have an effect of restoration of Company Petition for winding up. So, this restoration should be on certain conditions. Awarding some formal costs may not be sufficient in the

present case. So, Company Petition No. 51 of 1990 is hereby restored to file on following conditions that :

1) The applicant shall file an undertaking to the Registry and in the main proceedings that it shall not claim interest at the rate of 20% from the date of dismissal of the petition till present restoration application is moved in the Court ie. 17.8.2001 (i.e. period in between) but shall claim interest at the rate of 9% only;

2) The applicant shall file an undertaking to the effect that it shall not claim for declaration of transactions to be void or not binding to the applicant-company that have taken place between the date of dismissal of Company Petition No. 51 of 1990 i.e. 31.1.1995 and the order of restoration i.e. the date of this order;

3) The applicant shall draw the attention of the Company Judge, if ultimately winding up petition is to be allowed by the Company Judge at the end of the proceedings on merits about the above condition no. 2, so that final order, if any, passed, can take care of the situation.

4) The applicant shall pay costs of Rs. 5000/ for the present proceedings to the respondent-company and the same shall be deposited with the Registry of this court within 30 days from today;

5) Both the above undertakings as per conditions no. 1 and 2 shall have to be filed within 30 days from today;

24 It is clarified that in the event of failure in compliance of the above conditions by the applicant, the order of restoration of Company Petition No. 51 of 1990 shall have no effect and it would be construed that the same has been dismissed on the relevant date i.e. 31.1.1995.

25. This Company Application is allowed accordingly.

(C.K. BUCH, J.)
mandora/